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No. 95-2074

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, THE COMMONWEALTH OF PENNSYLVANIA, AND THE TERRITORIES OF AMERICAN SAMOA, GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONER, CITY OF BOERNE, TEXAS

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QUESTION PRESENTED

DOES THE RELIGIOUS FREEDOM RESTORATION ACT EXCEED CONGRESSIONAL AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF AMICUS INTEREST

A. Introduction.

Amicus State of Ohio and 15 other Amici States and Territories write to urge the Court to reverse the decision below and in the process to declare The Religious Freedom Restoration Act ("RFRA" or the "Act"), 42 U.S.C. 2000bb, *et seq.*, unconstitutional as applied to the States. In doing so, they join at least four other States -- California, New York, Illinois, Wisconsin -- that have already challenged the validity of RFRA in separate actions. *See, e.g., Rouser v. White*, 1996 U.S. Dist. LEXIS 16172 (E.D. Cal. 1996); *Bass v. Grottoli*, 1995 U.S. Dist. LEXIS 13906 (S.D.N.Y. 1995); *Van Dyke v. Washington*, 896 F.Supp. 183 (C.D. Ill. 1995); *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996).

The Amici States do not make this request lightly. RFRA tries to advance a commendable goal -- religious liberties -- and does so at the end of a legislative process that is as deserving of respect as each of the State legislative processes that it seeks to replace. But in the last analysis the pathmarking means used to further this legislative scheme exceed Congress's enumerated powers and disregard vital principles of federalism.

In the three short years since RFRA was enacted, it has disrupted several core functions of State governance. Whether it be running prisons, educating children, defining criminal laws, or exercising other police powers, RFRA has undermined the traditional discretion given to the States in these areas. Because the plain language of the Act enshrines the "least restrictive means" test as the across-the-board minimum for free exercise claims, it is difficult to be hopeful about regaining State authority over these areas any time

soon or about ultimately confining the damage to these areas alone.

No less promising is the impact that this theory of congressional authority could have on future federal-state relations. If blessed by the Court, this expansive theory of congressional authority -- applicable any time Congress chooses to protect constitutional "values" covered by the due process or equal protection clauses -- would have no fathomable stopping point. It would open most, if not all, areas of State governance to federal regulation, threatening to destroy the Constitution's most important liberty safeguard -- a distribution of power among the States and a balance of power between the national and State governments. *See New York v. United States*, 505 U.S. 144, 187 (1992) (the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day").

B. RFRA Has Substantially Impeded The States' Efforts To Run Their Prison Systems.

Today the status of RFRA is important to the States for one essential reason: The Act has dramatically increased the volume of inmate litigation and created unique burdens for prison administrators, States' Attorneys General and other State officials. Running a safe, secure and orderly prison system is one of the most difficult tasks consigned to State governments, and represents one of the States' core sovereign functions. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Yet RFRA encroaches on the States' authority to handle this responsibility in several important respects.

First, the sheer number of lawsuits generated by RFRA has itself placed a unique burden on State government. The Act has spawned a remarkable wave of inmate litigation in the years since it was passed. Based on a Lexis/Nexis search conducted on November 12, 1996, no fewer than 189 inmate cases have been decided involving RFRA-based challenges. Even this figure, of course, understates the volume of litigation -- first, because it only counts decided cases (Ohio, to use one example, is defending more than 60 other pending actions); second, because it fails to count unreported decisions; and third, because it does not account for the fact that many cases are class actions.

The litigation wave generated by RFRA disrupts State prisons and State prison administrators in many ways. As an initial matter, RFRA cases are harder to dispose of than most due to the difficulty (if not impossibility) of determining the accommodations that are truly necessary for the proper exercise of a given religion. Many of the cases, moreover, involve recycled claims that were defeated years ago under the reasonableness test applied to inmate free exercise claims. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Thus, though many of the claims now confronting State prison officials could not have met the pleading requirements of Rule 11 under prior law, they are now being litigated anew in every corner of the country.

For like reasons, RFRA lawsuits are expensive. New attorneys and experts must be hired to defend them; depositions and other discovery must be taken to respond to them; and successful lawsuits require costly reconfigurations of corrections programs, sometimes even prison buildings. Though it is too early to quantify the total costs to the States of RFRA, there can be little doubt that it truly is -- and will be -- an unfunded federal mandate.

Besides the difficulty of responding to this litigation and the cost of handling it, RFRA lawsuits compel corrections officials to divert extensive staff time to handling the litigation. They must investigate the "religious" nature of each claim and the "religious" necessity to each inmate of bringing the claim. Making matters worse is the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate even the most unusual and isolated demands. *See* Appendix B and C, Brief of Amici States in Support of Certiorari. Not surprisingly, litigation of this sort places a heavy tax on prison administration. *See generally* R. Engel & S. Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights and Violence*, 7 Harvard Journal of Law & Public Policy 413 (1994).

Second, RFRA exacerbates the challenges of running prisons by creating new security and administrative threats. It does so by allowing violent inmate gangs, racist organizations, drug distributors and like-minded groups to shroud illicit activity under the cover of "religious" belief.

Already the Act has been used by racist inmates attempting to cloak their agendas in "religion," making it more difficult for corrections officials to limit the disruption and other consequences of such activity. *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996) (racial segregation sought in the name of religious belief); *George v. Sullivan*, 896 F.Supp. 895 (W.D. Wis. 1995) (authority to distribute hate literature sought in the name of religious belief). Other inmates have attempted to justify possession of drugs in prison under RFRA. *See, e.g., United States v. Meyers*, 906 F.Supp. 1494 (D.Wyo. 1995), *aff'd*, 95 F.3d 1475 (9th Cir. 1996) (inmate claimed that distribution of drugs was permitted by his membership in the Church of Marijuana). By forcing prison officials to relax clothing, hair and other restrictions,

RFRA also has facilitated efforts to use drugs, distribute weapons or engage in other dangerous activities in the prisons. *See, e.g., Rust v. Clarke*, 883 F.Supp. 1293 (D. Neb. 1995), *aff'd*, 84 F.3d 841 (8th Cir. 1996) (inmate group sought swords and materials for burnt offerings); *Emel v. Mensinger*, 1996 U.S. Dist. LEXIS 13498 (E.D. Pa. 1996) (satanists claimed a right to burn bibles). The Act also has been used by inmate gangs to attempt to frustrate prison restrictions on the use of long hair, medallions and "colors" as gang identifiers. *See Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 193 (1996); *Abordo v. Hawaii*, 938 F.Supp. 656 (D. Haw. 1996); *Diaz v. Collins*, 872 F.Supp. 353 (E.D. Tex. 1994).

Even when officials defeat these attempts to hide illicit activity behind RFRA, the effort consumes significant staff time -- time diverted from finding dangerous contraband, stopping inmate-on-inmate predation, or providing rehabilitative services to inmates. Preliminary results of a national survey together with press reports indicate that prison staff have become hesitant to exercise traditional authority in this area for fear of running afoul of RFRA. This result echos the scholarly research on the burdensome effect of judicial intervention on prison operations. *See* Brief of State Amici Curiae In Support of Certiorari, A-12, n.3; D. Kilgoren & C. Hall, *Prison Officials Seek to Balance Security Needs, Religious Needs*, Washington Post, Oct. 7, 1996, at B1; C. Hall, *Ring Used Religion as Cover to Sneak Drugs Into Lorton*, The Washington Post, Sept. 27, 1996, at A1; Engel & Rothman, *supra*, at 430-432.

Third, and perhaps most frustrating of all, RFRA has undermined the very goal it was designed to advance -- sensitivity to the religious beliefs of prison inmates. The twin increase in lawsuit filings and demands for

accommodation diverts chaplains and other religious services personnel from their core mission of delivering religious services to prisoners. In addition, inmates adhering to differing faith groups, and even to differing denominations and sects within a faith group, often make conflicting demands, posing severe logistical challenges to prison staff. Finally, the unprecedented volume of inmate demands under RFRA has undermined the ability of religious services personnel to maintain the type of "pastoral" relationships with inmates necessary for the effective delivery of religious services. *See* Appendices B and C, State Amicus Brief in Support of Certiorari. Some prison systems, such as the Colorado and Oklahoma Departments of Corrections, have become so frustrated with the impact of RFRA that they have discontinued all State-funded chaplaincy programs. *Id.* at A-12, n. 3, A-15 - A-16.

C. RFRA Has Undermined Other Traditional State Police Powers as Well.

By dictating a universal strict scrutiny standard for clashes between individual religious liberty claims and collective security needs, RFRA also disrupts other core State police powers. In the area of education, for example, RFRA has generated a raft of unusual lawsuits. It has subjected such matters as the selection of songs performed by high school choirs, the enforcement of minimal educational standards and the disciplining of errant faculty to strict federal review. *See Bauchman v. West High School*, 900 F.Supp. 254 (D. Utah 1995); *Battles v. Anne Arundel County Bd. of Education*, 904 F.Supp. 471 (D. Md. 1995); *Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996). The Act has even sparked litigation over whether young children have a federal right to carry daggers to school. *See Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

Likewise, the RFRA mandate has made it more difficult for state and local governments to maintain public safety. The Act has generated extensive litigation over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations. *See Thiry v. Carlson*, 887 F.Supp. 1407 (D. Kans. 1995), *aff'd*, 78 F.3d 1491 (10th Cir. 1996); *Osborne v. Power*, 890 S.W. 2d 570 (Ark. 1994); *State v. Miller*, 202 Wis.2d 56, 549 N.W.2d. 235 (Wis. 1996); *State v. Bontrager*, No. 6-95-16 (Ohio Ct. App. Hardin Co., Oct. 18, 1996). Whether the States ultimately defeat these claims of course is only half the matter; the fact that Congress has seized authority to legislate in these areas and compelled States to divert substantial resources in defending actions under the legislation itself encroaches on State sovereignty.

SUMMARY OF ARGUMENT

In enacting RFRA, Congress assumed unique power. It claimed that section five of the Fourteenth Amendment allows it to enforce section one as the Court sees it *or* as Congress sees it. Surveying a century of free exercise decisions by the Court, Congress chose to make binding on the States the standard of review that the Court has applied in assessing some generally applicable laws impinging on religious liberties (strict scrutiny), while rejecting the standard that the Court has applied in assessing most such claims (reasonableness).

The statute thus in no way does the normal things that section five laws do: Prohibit specific laws violating the Fourteenth Amendment, *see Ex Parte Virginia*, 100 U.S. 339 (1880); prohibit specific laws that have been used to violate the amendment in the past, *see Katzenbach v. Morgan*,384

U.S. 641 (1966), *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); establish a cause of action for violations of the amendment, *see* 42 U.S.C. 1983; provide costs and fees to individuals who successfully establish such violations, *see* 42 U.S.C. 1988; or create damages actions against States for individuals who successfully establish such violations, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). What motivated Congress in passing RFRA was something different. It was not State recalcitrance in adhering to the requirements of the free exercise clause; it was congressional disagreement with the clause's terms. That is why the title of the Act and the statute itself say that Congress is "restor[ing]" the strict scrutiny test, and that it why Congress claimed it passed the legislation in order "to provide statutory protection for a constitutional *value* when the Supreme Court has been unwilling to assert its authority." H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993) (emphasis added). This novel theory of congressional authority has no foundation in precedent or logic.

1. The text and structure of the Fourteenth Amendment, the framers' debates about the amendment and the case law construing section five require Congress to anchor section five legislation to violations of section one.

a. The text of section five grants Congress authority "to enforce" the provisions of section one. It thus gives Congress power only to compel obedience to the equal protection and due process clauses of section one. It does not empower Congress to redefine the constitutional guarantees or what comes to the same thing -- pile prophylactic rules on top of prophylactic rules in order to protect the *values* underlying the guarantees. As the text makes clear, a fundamental predicate to all congressional authority under section five is a violation of the Fourteenth Amendment. It makes little sense to speak of power to

compel adherence to a constitutional requirement, when that power is being exercised to authorize legislation that has meaning only as applied to those States that have *obeyed* the guarantee. When the framers wished to grant broader regulatory power to Congress, they knew how to do so. *See* Art. I, § 8, (granting power "to regulate . . . Commerce between the States"). They simply did not exercise that authority here, and their decision should be respected.

b. The debates over the Fourteenth Amendment confirm that the words mean what they say. When Congress had an opportunity to adopt a broader version of section five, which was offered in February 1866, it rejected the proposal. To the Amici States' knowledge, moreover, no participant in the debates embraced the interpretation of the Fourteenth Amendment offered here -- namely, that section one incorporates most of the first eight amendments *and* that section five allows Congress to enforce both the meaning of the amendments and any *values* underlying them. Such an amendment could not have been ratified in 1870; it would not be ratified today.

c. Consistent with the text and the framers' debates, the case law construing section five requires Congress to anchor its authority to prior or ongoing violations of the Fourteenth Amendment. Whether one consults older cases, *see Ex Parte Virginia*, 100 U.S. 339 (1880), *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Civil Rights Cases*, 109 U.S. 3 (1883), or newer ones, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Oregon v. Mitchell*, 400 U.S. 112 (1970), *City of Rome v. United States*, 446 U.S. 156 (1980), the Court has long required Congress to link section five legislation to prior or ongoing violations of the Fourteenth Amendment. *Dicta* in *Morgan* to the contrary is just that, and has never received the essential support of five members of the Court.

2. Measured against these criteria, Congress has exceeded its authority in enacting RFRA. The federal law plainly does not prohibit *ongoing* violations of the Fourteenth Amendment. Congress did not claim -- and could not have claimed -- that RFRA compels States to obey the dictates of the free exercise clause today and tomorrow. Under the clause, generally applicable and facially neutral laws do not receive strict scrutiny. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S.Ct. 2217 (1993). Nor does RFRA in any way remedy *prior* free exercise violations. It simply creates a standard of review for assessing *all* free exercise claims, not just those concerning State laws that have been used to violate constitutional rights, but any and all laws that substantially intersect with religious liberties.

3. Adopting the RFRA theory of section five authority, moreover, would transform the federal government from one of limited powers to one of unlimited powers. If Congress is allowed to enforce constitutional *values*, as opposed to constitutional *violations*, there is no stopping point to its authority. All rational federal legislation would protect the values underlying the equal protection clause, particularly the requirement that State laws need to be rational. So too would federal legislation that simply requires State laws to be a little more rational -- for example, "substantially rational." It also takes little imagination to use this version of section five authority to protect an assortment of values covered by the due process clause. Congress could federalize all law enforcement in the name of the Fourth and Fifth Amendments, all punishment and all definitions of crime in the name of the Eighth Amendment, and all speech in the name of the First Amendment. Because all legislation in one way or another addresses the age-old conflict between the values of security and liberty, this theory makes section five

anything but an enumerated federal power. Indeed, left intact, the RFRA theory of congressional power not only threatens the foundations of our federalism system but it also threatens the vitality of the Court's landmark decisions in *New York v. United States*, 505 U.S. 144 (1992), *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995), and *Seminole Tribe v. Florida*, ____ U.S. ____, 116 S.Ct. 1114 (1996).

ARGUMENT

At the outset, it is important to clarify the breadth of section five power that Congress has assumed in this instance. Enacted in 1993, RFRA was expressly designed to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), and to "restore" the strict scrutiny test that ostensibly was applicable to claims arising under the Free Exercise Clause of the First and Fourteenth Amendments to the United States Constitution. In Congress's view, because section five empowers the federal government "to provide statutory protection for a constitutional *value* when the Supreme Court has been unwilling to assert its authority," H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993) (emphasis added), the meaning of the constitutional guarantee does not limit congressional power. As RFRA itself demonstrates, moreover, this broad section five power purportedly extends to *all* values protected in whole or in part by the equal protection and due process clauses, including those guarantees of the Bill of Rights that have been selectively incorporated and made applicable to the States.

Congress is wrong. And so was the lower court in blessing this expensive theory of section five power. Neither the text of section five, the structure of the Fourteenth Amendment, the ratification debates, nor the case law construing the provision supports this view. Accordingly,

the Court should invalidate RFRA as applied to the States, and clarify that section five legislation must be tied to violations of the Fourteenth Amendment.

I. Section Five Legislation Must Be Linked To Violations Of The Fourteenth Amendment.

A. The Text and Structure Of The Fourteenth Amendment Establish That Congress's Section Five Authority Must Be Tethered To Violations Of Section One.

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
>
> "Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

Section five combines a broad power (to pass "appropriate legislation") with a broad limitation on that power (to do so only when "enforc[ing] . . . the provisions of this article"). Old and new dictionaries confirm that the verb "enforce" is a confining one. It just empowers Congress to compel "obedience" to something -- here, to require the States to adhere to the prohibitions contained in the equal protection and due process clauses. *See* Webster, *An American Dictionary of the English Language* (1869) ("1.

To put force upon; to force; to constrain; to compel; as to *enforce* obedience to commands."); Webster, *An American Dictionary of the English Language* (1878) (same). *See also A Dictionary of Law* (1893) 466 ("To constrain, or compel; to give effect to: as, to enforce an order of court."); *Dictionary of Words and Phrases* (1899) 322 ("To cause to have force and effect. To compel obedience to."); *The Oxford English Dictionary* (1933) Vol. III, 171 ("To compel the observance of (a law); to support by force (a claim, demand, obligation)."); *Webster's New International Dictionary* (1939) 847 ("To force; constrain; compel; as, to *enforce* obedience.").

Nothing about the word "enforce," the definitions of it, or the sentence in which it appears, offers any hint that the term includes the authority to "define," to "amend," or to "expand" the constitutional rights guaranteed by the Fourteenth Amendment. On the contrary, such a construction makes little sense. How can it plausibly be said that Congress is requiring obedience to a prohibition (the free exercise clause) when it passes a law that is meaningful only as applied to those who have obeyed the provision?

Other provisions of the Constitution deploy enforcement clauses, and in each instance appear to use "enforce" similarly -- simply to require adherence to the constitutional provision, not to redefine it. *See* U.S. Const. amends. XIII, XIV, XVIII, XIX, XXIII, XXIV and XXVI. Still other clauses indicate that the framers knew how to express themselves differently when they had something else in mind. When they wished to combine in Congress a broad power both to define and enforce federal requirements, they called it the power "to regulate." *See, e.g.*, Art. I, § 8 (granting Congress power "to regulate Commerce . . . among the several States"). Having failed to use this

touchstone of broad congressional authority here, their decision should be respected.

In the end, "to enforce" simply means to require obedience to -- no more no less. The words thus should be given the only content they contain: The power "to enforce. . . the provisions of this article" means the power to make the States follow these provisions, not the power to define the rights themselves or to regulate under them generally. Unless anchored to a violation of the Fourteenth Amendment, in short, Congress has no authority under section five.

B. The Framers' Debates Confirm that a Constitutional Wrong Must Exist Before Congress May Exercise Its Section Five Power.

The drafting and debating history of section five confirm that the words mean what they say. While page limitations prohibit thorough coverage of the exhaustive scholarship on this issue, two features of the debates deserve emphasis. First, Congress had an opportunity to approve a proposed amendment that would have supported (or at least begun to support) the interpretation advanced here. In February 1866, Representative Bingham of Ohio proposed the following language:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). This early proposal might have begun to establish a grant of power to Congress substantively to legislate civil rights, and possibly even to define them. The proposal, however, was rejected. Ultimately section five just established a congressional power to enforce the amendment's prohibitions against recalcitrant States, not a plenary power to federalize Congress's own interpretation of the amendment.

Second, while the debates arguably remain ambiguous on whether the Fourteenth Amendment was intended to make the first eight amendments applicable in whole or in part to the States, *compare Adamson v. California*, 332 U.S. 46, 63-64 (1947) (Frankfurter, J., concurring); with *id.* at 74-75 (Black, J., dissenting), not one of the framers simultaneously advanced the two suggestions embraced here. In other words, no one (to the State Amici's knowledge) thought that the provision made the first eight amendments applicable to the States *and* granted Congress plenary authority to place its own interpretive gloss on these and the other guarantees of the Fourteenth Amendment. It takes little historical imagination to anticipate the congressional opposition to such a proposal, let alone the implausibility of its being ratified by the requisite three-fourths of the States.

C. The Court's Section Five Holdings All Require Section Five Legislation To Be Tied To Constitutional Wrongs.

The Court's section five holdings all respect the textual limitation that the phrase "to enforce" places on congressional authority in this area. Even with respect to the central evils addressed by the Fourteenth Amendment -- race and voting -- the Court has long required congressional

authority to be linked to actual violations of the underlying amendment.

Early opinions of the Court, written against the immediate backdrop of the ratification debates, confirm that section five legislation must be tethered to Fourteenth Amendment violations. For example, in *Ex Parte Virginia*, 100 U.S. 339 (1880), the Court upheld application of civil rights legislation to a state trial court judge who excluded jurors on account of race. In doing so, the Court made clear that section five was intended only to "enforce submission to the prohibitions" of the amendment, *id.* at 346, not to enlarge them. Thus, while section five "gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment," the Court made clear that it "is but a limited authority" that "extend[s] only to a single class of cases." *Id.* at 348.

To the same effect is *Strauder v. West Virginia*, 100 U.S. 303 (1880), which upheld federal legislation permitting removal of a civil rights claim from state to federal court. Again, the enforcement legislation did not enlarge the protections of the Fourteenth Amendment; it simply gave victims a mechanism for removing such claims to a neutral federal forum. Only "[i]f . . . the States did not conform their laws to [the Fourteenth Amendment's] requirements" was Congress "authorized to enforce" them by suitable legislation. *Id.* at 307 (quotation omitted). The point of section five, the Court explained, was not to authorize Congress to place its own gloss on the amendment but to address the problem that "prejudice" in the States could make the guarantees a dead letter. *Id.* at 309. Indeed, "[w]ithout the apprehended existence of prejudice that portion of the amendment would have been unnecessary." *Id.*

A few years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court considered whether Congress had authority to enact the Civil Rights Act of 1875 which prohibited discrimination in inns, public conveyances, theaters and other public places of enjoyment. In invalidating the law, the Court held that section five is purely remedial in scope.

> [T]he last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. *This is the legislative power conferred upon Congress, and this is the whole of it.* It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action, of the kind referred to.

Id. at 11 (emphasis added). In determining that the enforcement power had to be "remedial" or "corrective" in nature, the Court acknowledged that enforcement "legislation may and should be provided in advance to meet the exigency when it arises." *Id.* at 13. But in doing so the Court warned that the legislation had to "be adapted to the mischief and wrong which the Amendment was intended to provide against." *Id.* at 13. It "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be . . . to make Congress take the place of the State Legislatures and to supersede them." *Id.* *See id.* at 13-14.

More recent decisions of the Court reaffirm these principles. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court addressed the validity of voting rights legislation enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 309. Concluding that prior remedies had been "unsuccessful," Congress replaced them with "sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *Id.* *See generally id.* at 309-15, 328, 334-35, 337. In upholding the law's suspension of literacy tests, the Court acknowledged that it had recently upheld such tests in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). But it held that this does not end the matter: Facially neutral literacy tests may be -- and had in the past been -- "instituted with the purpose of disenfranchising Negroes." *South Carolina*, 383 U.S. at 333-34. Recognizing that "the Fifteenth Amendment has clearly been violated" through the imposition of literacy tests in the past, the Court upheld the remedial legislation. *Id.*

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court reached a similar result -- upholding a federal literacy test ban under the enforcement clause of the Fourteenth Amendment. Again, the Court addressed a federal ban that covered State laws that were generically approved in *Lassiter*. And again the Court approved the law after concluding that it "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications." *Id.* at 653-54. Thus, only after reciting evidence that the English literacy requirement had been used as "an invidious discrimination in violation of the Equal Protection Clause," *id.* at 656, did the Court conclude that Congress had authority to enact the section five legislation, *id.* at 654-56.

Nor do other passages in *Morgan* change things. *See* 384 U.S. at 648-654. Although certain portions of the opinion state broadly that Congress may "exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," *id.* at 651, they do not establish that Congress has discretion to determine what constitutes a Fourteenth Amendment violation or to legislate in spite of, as opposed to because of, constitutional violations. Otherwise, the Court's repeated references to the "invidious discrimination" caused by the prior use of literacy tests, *see id.* at 653-54, 656, make little sense. At any rate, neither these nor any other passages of the opinion pretend to overrule the Court's prior decisions, which all establish that Congress must take the Constitution as it finds it.

Later cases are to the same effect. They each contain similar findings concerning past or ongoing violations of the Fourteenth Amendment. *See Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) (Black, J., writing for Court) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J. concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (incorporating prior findings of racial discrimination in case law and refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes") (quotations omitted).

All things considered, the text of section five, the history behind the provision and the case law construing it establish this: Before Congress may invoke its enforcement authority under section five, there must be a prior or ongoing constitutional wrong. And, while the egregiousness of the wrong may extend Congress's remedial discretion, *see South Carolina*, 383 U.S. at 334 ("exceptional conditions can justify legislative measures not otherwise appropriate") (citation omitted), a constitutional wrong is -- and always has been -- a preliminary requirement.

II. RFRA Exceeds Congressional Authority Under Section Five.

Measured against these requirements, RFRA is plainly invalid. Any power that Congress has under section five to enforce the Fourteenth Amendment simply does not go this far -- to an Act that does not correct specific legislation but attempts to erect a standard of review for courts assessing future legislation, and to an Act that does not remedy a constitutional wrong but attempts to create a quasi-constitutional right.

A. RFRA Does Not Correct Ongoing Free Exercise Violations.

As a matter of plain meaning and common sense, there is no plausible argument that RFRA was enacted to prohibit *ongoing* violations of the Fourteenth Amendment -- specifically the free exercise clause of the First Amendment. According to the Court, the free exercise clause means that generally applicable, facially neutral laws do not receive strict scrutiny. *See Smith*, 494 U.S. 872 (and cases cited therein). But, according to Congress's efforts to enforce that provision, RFRA now requires strict scrutiny for such

claims. Far from enforcing the Bill of Rights in this instance, Congress simply has tried to change its meaning. The Court has never endorsed such an interpretation of section five. It should not do so now.

B. RFRA Does Not Remedy Prior Free Exercise Violations.

Nor can Respondent tenably argue that RFRA remedies *prior* free exercise violations. The only "evil" Congress attempted to "root out" is the Court's free exercise decisions that did not invoke strict scrutiny, and the only "remedy" RFRA provides is Congress's own interpretation of the free exercise clause. No precedent supports this exercise of section five power.

In each of the cases upholding Congress's exercise of this authority, the legislature identified a specific area of State legislation that undermined the goals of the Fourteenth Amendment and sought to eradicate these specific types of state law practices. But in none of these cases did Congress simply prescribe a standard of review for courts to use in assessing all future individual claims that the government had violated a Bill of Rights' guarantee. In this respect, RFRA differs from every section five case before it. It is purely definitional in nature, and simply reweighs the constitutional interests in cases involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. §2000bb-2(4). To the States' knowledge, in fact, Congress has never before globally changed the Court's interpretation of a Bill of Rights' provision by redefining, for all future cases involving that right, the relationship between the individual right asserted and the countervailing power of government.

Even aside from RFRA's failure to root out a specific state practice, the statute contains another constitutional flaw. It does not even pretend to exercise the kind of congressional power that section five contemplates. Notwithstanding the act's "findings," RFRA contains no indicia that Congress employed its "specially informed legislative competence" from which the Court might discern the "predicate" for Congress's "judgment" in this area. *Morgan*, 384 U.S. at 656. For example, there is no finding that the country is having problems with neutral state laws impinging on the religious freedom of citizens, and no suggestion that Know-Nothing legislation lies on the horizon. Nor does the specific fact pattern at issue in *Smith* -- Native American use of peyote as a religious practice -- even begin to justify the far-reaching legislation that Congress passed. Consider the reaction if Congress in the 1960's had exercised its section five power in the same way that RFRA does. Instead of passing the Voting Rights Act of 1965, which targeted specific voting rights problems and specific voting rights practices, Congress would have passed a law that dictated the appropriate standard of review for all voting rights challenges -- for example, holding that they all receive strict scrutiny even if no intentional discrimination is shown. It is unfathomable that even *Morgan* would have permitted such a trespass on States' rights.

Ultimately the only "judgment" Congress exercised in passing RFRA was its disagreement with the free exercise decisions of the Court that failed to apply strict scrutiny. Such "findings," or more precisely the lack thereof, do not support legislation related to race and voting rights, let alone legislation having to do with religion. *Morgan*, 384 U.S. at 653. Deference thus is only appropriate in an area in which Congress is competent to act, which simply does not include the appropriate standard of review for assessing free exercise claims. Congress cannot justify RFRA on any remedial

theory of section five power because there is no known constitutional wrong that the statute attempts to fix and no recognized congressional competence that the statute attempts to exercise. It would be one thing if this expansion of federal power came on the heels of the States' failure to respect a constitutional guarantee, as arguably was the case with the Voting Rights Act. There, at least, it could be said that the States brought the loss of authority on themselves. But it is quite another thing when Congress acts simply because of disagreement over the Constitution's terms. That was never the purpose of section five.

III. A Contrary Ruling Would Threaten Vital Principles Of Federalism.

No doubt the Fourteenth Amendment took power from the States and gave it to the federal government. But in doing so it did not repeal the Tenth Amendment or the principles of federalism for which it stands. Even after passage of the Fourteenth Amendment, the Constitution remains "an instrument of limited and enumerated powers," *New York v. United States*, 505 U.S. 144, 156 (1992) (quotation omitted), and the federal government likewise remains one "of limited powers," *id.* at 155 (quotation omitted). Quite simply, "the 14th amendment does not override all principles of federalism," *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991), which still "secures to citizens the liberties that derive from the diffusion of sovereign power," *New York*, 505 U.S. at 181 (quotation omitted).

For these reasons, before adopting an interpretation of the Constitution that "radically change[s] the whole theory of the relations of the State and Federal governments to each other," the Court requires "language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. 36, 78 (1873). *See also Hurtado v.*

California, 110 U.S. 516, 534-35 (1884); Joseph Story, *Commentaries on the Constitution of the United States* 957 (5th ed. 1905) (observing that the Constitution "is founded on a wholesome and strenuous jealousy, which foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, so far as is practicable"). The Constitution simply does not require -- either clearly or subtly -- the "radical change" to State-Federal relations that RFRA advances.

A. The Act Dramatically Limits Sovereignty Over Some Of The States' Most Basic Police Powers.

RFRA hampers the States in the exercise of basic police powers -- most conspicuously the operation of State prisons. As *Bell v. Wolfish*, 441 U.S. 520 (1974) noted:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ... *such considerations are peculiarly within the province and professional expertise of corrections officials.*

Id. at 547 (emphasis added) (citations omitted).

Just last Term, the Court reiterated the disruptive effect that strict scrutiny would have on prison operations:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

Lewis v. Casey, 518 U.S. ____, 116 S. Ct. 2174 (1996) (quotation omitted).

As illustrated by the Statement of *Amicus* Interest, it is difficult to overstate the impact that RFRA has had on the States' administration of their prisons. The number of cases, the difficulty of resolving RFRA claims and the drain on State resources caused by the Act all have significantly burdened the States in this area.

Nor is the damage to State sovereignty caused by RFRA limited to these police powers alone. It affects education, public safety and other local functions. And no doubt, over time, other core areas of State governance will be preempted by RFRA's boundless requirement that the "least restrictive means" be used whenever general laws confront individual claims of religious liberty. That is why nearly half the States have filed challenges to the constitutionality of RFRA or joined briefs calling for its invalidation.

B. If Upheld, This Theory Of Section Five Authority Would Transform The Federal Government From One Of Limited Powers To One Of Unlimited Powers.

Perhaps worse, this broad theory of section five power could irreversibly impact other areas of State governance. What ultimately makes RFRA a Rubicon-crossing law is the exceedingly broad interpretation of section five authority on which it rests. There is nothing the least bit enumerated or in any way limited about a power to "protect[ ] constitutional value[s]" whenever Congress sees fit. H.R. Rep. No. 88, 103d Cong., 1st Sess., at 9 (1993). If Congress is right about this interpretation of section five authority, it is no exaggeration to conclude that the theory ultimately transforms the federal government from one of limited to one of unlimited powers.

Consider the broad powers available to Congress in "enforcing" the equal protection clause. Not only does this clause prevent States from using suspect classifications, but it also prohibits them from drawing irrational classifications. *See e.g.*, *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989). As to the latter requirement, a prophylactic authority to enforce this constitutional value has no stopping point. Virtually any federal law that itself is rational can fairly be said to curb the risk of irrational state lawmaking in the area. Or like RFRA itself, Congress could just pass a law requiring all state laws to be more rational, say, "substantially rational." Placing prophylactic rules on top of prophylactic rules would convert section five from an enforcement provision into a general police power. That simply was never intended. *Cf. United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1634 (1995)

(declining to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *New York v. United States*, 505 U.S. 144 (1992).

Nor is the prospect of extending RFRA's logic to due process guarantees any less threatening to the vitality of a dual system of government with "powers . . . reserved to the States." U.S. Const. am. X. Whether used to protect the pure procedural guarantees of the due process clause, the substantive incorporation of selected guarantees contained in the Bill of Rights, or the other substantive guarantees of the clause, the theory eviscerates the principle that the States enjoy plenary police powers subject to the limited, specifically enumerated powers of Congress.

It takes little vision to anticipate how authority to protect procedural due process values could be transformed into an horizonless grant of legislative authority. Every law can be characterized in one way or another as involving "life, liberty, or property." That leaves the federal government a short step away from legislating a more appropriate "process" for State governments to follow before impacting these all-encompassing interests. *Civil Rights Cases*, 109 U.S. 3, 13 (1883) ("It is absurd to affirm that, because the rights of life, liberty and property, (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case.").

Similar threats flow from application of this theory to incorporated rights and other substantive due process guarantees. If RFRA is good law, what would prevent

Congress from passing legislation regulating all encounters between state law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment values? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), in the name of protecting the values of the Takings Clause? What would prevent federal legislation nationalizing a system of punishments in the name of protecting Eighth Amendment values? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees?

The RFRA theory, in short, raises many questions. And the answers to all of them render implausible the reconciliation of this broad theory of section five power with a system in which the national government has just limited powers. Indeed, under this theory, it is not clear why the Court's landmark federalism decisions in *Lopez v. United States*, *Seminole Tribe v. Florida*, and *New York v. United States*, are not a prophylactic step away from irrelevance. The sole limitation on the national government would be the decision not to exercise its power. Only a most feeble version of federalism would depend on congressional self restraint for its existence.

In the end, because all legislation in one way or another addresses the zero-sum conflict between the security interests of the collective citizenry and the liberty interests of the individual, there is almost nothing Congress could not do under this version of section five power. Quite simply, Congress's authority under the provision does not extend this far. The court of appeals' contrary ruling should be reversed.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to reverse the decision of the court of appeals and declare RFRA unconstitutional as applied to the States.

Respectfully submitted,

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